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85-1218

No._____

In The
Supreme Court of the United States
October Term, 1985

RALPH KEMP, WARDEN,

Petitioner,

v.

CHARLES THOMAS CORN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTHCIRCUIT

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

-1-

The Eleventh circuit properly recalled the mandate, sua sponte in order to prevent a miscarriage of justice and did not abuse its discretion.

-2-

The Eleventh Circuit properly ruled that the charge in the instant case was violative of Sandstrom v. Montana, 442 U.S. 510 (1979).

-3-

The Eleventh Circuit properly concluded that the Sandstrom violations were not harmless error.

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REASONS TO DENY THE WRIT

A. THE ELEVENTH CIRCUIT PROPERLY RECALLED THE MANDATE, SUA SPONTE IN ORDER TO PREVENT A MISCARRIAGE OF JUSTICE AND DID NOT ABUSE ITS DISCRETION.

The Eleventh Circuit, after denying respondent's motion for rehearing, recalled the mandate sua sponte. This was done because the Court was unable to distinguish the jury charge in Corn v. Zant, 708 F.2d 549 (11th Cir., 1983); 714 F.2d 159 (11t6hCir., 1983) from the one that this Court disapproved in Francis v. Franklin, _____U.S._____, 104 S.Ct. 1965 (1985).

Rather than the mere duplication of two sentences in the charges referred to above, the substantial aspects of the charges in Francis, supra, and Corn, supra are very similar. Both cases deal with burden shifting instructions which impermissibly shift the burden of proof to the defendant.

This Court should not concern itself with the actions of the Eleventh Circuit in recalling the mandate sua sponte. Absent an abuse by the Eleventh Circuit, its actions are not subject to review by this Court. Such an action is not a "special and important reason" for granting the Writ as required. See: Rule 17, Rules of the Supreme Court of the United States; NLRB vs. Pittsburgh S. S. Co., 340 U.S. 498 (1951).

Petitioner argues that the failure of this Court to grant certiorari to respondent upon his application from the original ruling of the Eleventh Circuit indicates a basis for the Writ to be granted in the instant petition. As has been held, denial of certiorari imports nothing as to the merits of the case. Brown vs. Allen, 344 U.S. 443, 73 S.Ct. 397 (1953).

Under the Rules of the United States Court of Appeals for the Eleventh Circuit, Rule 27, a mandate may not be recalled except to prevent injustice. Clearly, recall of the mandatein the instant case was done to prevent a manifest injustice from being done to respondent. Such a recall cannot be considered an abuse of the Court's power in light of the Francis decision. Rather, the failure to redress the obvious inconsistencies in the

original decision would have been abusive.

The Eleventh Circuit should be commended for recalling themandate and correcting the inconsistencies in the original decision, and should not be reversed. If the Court's action was out of order or an abuse of power, the Court would have granted petitioner's petition for rehearing en banc. Clearly, the entire Court concurred in the recall of the mandate, sua sponte and would not have taken such unusual action if it did not believe that the original opinion was substantially incorrect.

Petitioner's argument that other circuits could utilize a recall of mandate to indefinitely delay a case is totally without merit. Except where manifest injustice may be done if the mandate is not recalled, it would be unlikely that the courts would use such a procedure to delay any case. The only reason that the Eleventh Circuit recalled the mandate was to correct the obvious error of its prior decision.

B. THE ELEVENTH CIRCUIT PROPERLY RULED THAT THE CHARGE IN THE INSTANT CASE WAS VIOLATIVE OF SANDSTROM V. MONTANA, 442 U.S. 510 (1979).

This Court has held that jury instructions virtually identical to those in the instant case are impermissibly burden-shifting Francis v. Franklin, ____U.S._____, 104 S.Ct. 1965 (1985).

The first question presented in Francis rests upon the deicision that the following language in the jury instructions violated Sandstrom:

> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumptrion may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probably consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention, but the trier of facts, that is, the jury may find criminal intention upon a consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted." Petition for Writ of Certiorari, Francis v. Franklin. pp.5-6

The operant language in the jury instructions at respondent Corn's trial was virtually identical:

> "I charge you that acts of a person of sound mind and discretion are presumed to be the product of a person's will, but this presumption may be rebutted. A person of sound mind and discretion is presumed to intend the naturaland probableconsequences of his acts. If such person uses a weapon in a manner in which such weapon is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. However, this presumption may be rebutted. A person will not be presumed to act with criminal intention, but the trier of the facts, and this is you, the jury, in this case, may find such intention upon consideration of the words, conduct, demeanor, and motive, if any, and all facts and circumstances connected with the act for which the accused is prosecuted." Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, Corn v. Zant, p. 12.

Apart from insignificant choices of phraseology, the only difference between these two instructions is the addition in the Corn instruction of the sentence concerning a weapon. That sentence, however, also contains "the law presumes" language that is the crux of the Sandstrom problem in these cases. Accordingly, the instruction in Corn is even more problematic than that in Francis. Thus, this Court's decision in Francis controls the correct disposition in Corn. Since this Court finds the Francis instruction to violate Sandstrom, then a fortiori the instruction in Corn does so as well.

It should be noted that the very panel that had reversed the lower courts in Corn was the panel that issued the opinion reversing its own prior decision. Such action was not taken lightly. Respondent had prevailed before the Magistrate on the Sandstrom issue. In fact, the orignal opinion of the Eleventh Circuit was the only federal court to deny relief to the Respondent. Therefore, the action of the Eleventh Circuit5 in granting relief is indicative of the substantive nature of respondent's claims. The characterization of the jury charge in Corn by the petitioner as being substantially different from Francis is misleading.

If anything, the charge in Corn is nore violative of the Constitution than the charge in Francis, supra. Therefore, this Court should not grant the writ based upon any alleged distinction between Corn and Francis. The decision of the Eleventh Circuit to reverse the respondent's conviction was a

logical application of its prior decisions as well as this Court's decision in Francis. Obviously, the Eleventh circuit considered the charge as a whole and did not isolate two sentences on reversing respondent's conviction. Review by this Court is wholly unnecessary.

C. THE ELEVENTH CIRCUIT PROPERLY CONCLUDED THAT THE SANDSTROM VIOLATIONS WERE NOT HARMLESS ERROR.

In the instant case, respondent's defense centered on insanity and his lack of intent during the commission of the alleged crimes. Respondent presented the testimony of a psychiatrist that he was insane at the time of the murder. The State's psychiatrist admitted that respondent was severely emotionally disturbed and had no opinion of respondent's sanity during the murder. It is not contested that respondent has a low IQ of 69. The only evidence of sanity presented by the State was the opinions of respondent's wife and mother-in-law, neither of whom had any education or training in psychology or psychiatry. At no time did respondent concede the issue of sanity or intent. These facts do not meet the criteria of harmless error for a Sandstrom violation. Connecticut v. Johnson, 460 U.S. 73 (1983). The likelihood is great that the jury applied the erroneous standards enunciated in the charge in reaching its decision.

Petitioner agrues that there could not be harmful error in Corn's charge because the jury must have rejected respondent's defense in reaching its verdict. Such reasoning is circuitous. Under such an analysis, no burden-shifting instruction would be harmful error since the jury must have decided that the defendant was sane when the crime was committed. Such a result cannot be intended by this Court. Otherwise, there would be no need for deciding whether a particular instruction violated Sandstrom when such violation must be harmless. Any presumption as to the effect of an offensive instruction must be that harm is presumed. Particularly in a case such as Corn, where sanity and intent were contested, the Court must presume any burden-shifting error in

the charge to be harmful. The Fifth Circuit (prior to dividing into the Fifth and Eleventh Circuits) has held that an unconstitutional jury instruction on an element of a crime can never be harmless error. Hammontree v. Phelps, 605 F.2d 1371, 1380 (5thCir., 1979). Such an analysis is more logical than to arbitrarily review each case's instruction and "guess" what a juror may have understood. Administratively, it is easier to rule an offensive instruction to be harmful if it shifts the burden of proof to a defendant, than to speculate upon a juror's perception of the instruction.

In the instant case, there is no question that respondent raised sanity and intent as his defense at his trial. Therefore, petitioner's analysis is faulty in applying cases where the defendant waived his or her defense during trial to the instant case. See:Connecticut v. Johnson, supra. As applied to the facts of this case, the jury instruction could not be harmless error. Rather, it deprived respondent of his only defense to the murder. What greater harm should respondent have to show in order to get a reversal of his conviction? Given the paucity of evidence of respondent's sanity, it would be a miscarriage of justice to reinstate respondent's conviction. Therefore, this Court should deny certiorari to the petitioner.

CONCLUSION

Respondent has shown that the Eleventh Circuit's recall of the mandate was proper and is not an abuse of discretion by the Eleventh Circuit.

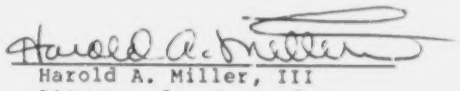
Secondly, the charge is substantively similar to that in Francis, supra. Therefore, reversal of respondent's conviction is mandated in order to be consistent.

Finally, petitioner argues that the instant instructions, though unconstitutional, constitute harmless error. When a defendant raises sanity and intent as a defense to a crime, burden-shifting instructions cannot be held to be harmless.

Therefore, for the reasons stated above, the writ should be

denied to the petitioner. The Eleventh Circuit carefully considered the State's claims and found them to be meritless. Therefore, it would be a travesty to grant the writ of certiorari and reinstate respondent's conviction.

Respectfully submitted,



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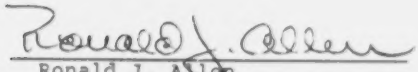

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85-1218

CERTIFICATE OF FILING

Counsel for respondent hereby certifies that he has submitted his application for admission to practice before this Court with ten copies of repondent's brief is opposition to granting the writ of certiorari and motion for leave to proceed in forma pauperis by despositng the same in the U. S. Mail, with prepaid first class postage and properly addressed to the Clerk of this Court. This mailing was made on March 6, 1986, within the time prescribed by this Court.

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SWORN TO and SUBSCRIBED
before me this 6th
day of March, 1986.

Linda C. Miller
Notary Public

My commission expires: September 26, 1986

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